

Johnson v 767 Fifth Partners LLC

2023 NY Slip Op 30935(U)

March 27, 2023

Supreme Court, New York County

Docket Number: Index No. 160575/2020

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ **PART** **47**

Justice

-----X

TIMOTHY JOHNSON,

Plaintiff,

- v -

767 FIFTH PARTNERS LLC,APPLE INC.,STRUCTURE
TONE, LLC,

Defendants.

-----X

STRUCTURE TONE, LLC

Plaintiff,

-against-

PLATFORM SOLUTIONS, INC.

Defendant.

-----X

767 FIFTH PARTNERS LLC, APPLE INC., STRUCTURE
TONE, LLC

Plaintiffs,

-against-

Defendant.

-----X

INDEX NO. 160575/2020

MOTION DATE 01/05/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595550/2021

Second Third-Party
Index No. 596066/2021

The following e-filed documents, listed by NYSCEF document number (Motion 003) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93, 94, 95, 96, 97, 98, 99, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 121

were read on this motion to/for JUDGMENT - SUMMARY.

In this Labor Law personal injury action plaintiff Timothy Johnson alleges he was working as a carpenter for his employer, third-party defendant Platform Solutions, Inc. (Platform

Solutions), when he was injured by an unsecured stack of metal gates that fell onto him during the course of his work at 767 Fifth Avenue, New York, New York (premises). Defendant 767 Fifth Partners LLC owns the premises, defendant Apple Inc. (Apple) leases the premises, defendant Structure Tone, LLC (Structure Tone) was the general contractor of the construction project, and Platform Solutions was hired by Structure Tone to install a metal gating system to protect the construction site (Statement of Material Facts, ¶¶ 1-2, 6, NYSCEF Doc No 70).

Plaintiff now moves, pursuant to CPLR § 3212, for summary judgment on the issue of liability on his Labor Law § 240 [1] claim (motion seq no 003).

BACKGROUND

On July 13, 2017, Apple contracted with Structure Tone for the “design and fit out” of the Apple store located at the premises (Exh I, p 1, NYSCEF Doc No 80). Structure Tone was required to provide and maintain “temporary barriers and all other temporary protection necessary to prevent damage to existing structures” (*id.* at p 66). In fulfilling its responsibility, Structure Tone hired Platform Solutions to install a metal gating system to protect the construction site (NYSCEF Doc No 70, ¶ 6). Plaintiff was a carpenter for Platform Solutions and was assigned to work on this project (*id.* at ¶ 8).

On October 31, 2020, plaintiff and his co-workers were instructed by the project foreman, Peter Keller, to move metal gates from a flatbed truck onto a forklift (*id.* at ¶ 10). Each gate measured approximately 10 feet by 10 feet and weighed approximately 120 pounds, as estimated by plaintiff and undisputed by defendant (*id.* at ¶¶ 12-13). The gates were secured by straps in stacks on the truck (*id.* at ¶ 11). Since the forklift could not lift the stacks off of the truck, the foreman instructed plaintiff and his co-workers to cut the straps and remove the gates one by one from the truck onto the forklift (*id.* at ¶ 15). Plaintiff stood on the ground at the back of the truck

and next to the forklift as he began moving the gates by hand onto the forklift (*id.* at ¶ 16). After approximately 15 to 20 gates had been loaded onto the forklift unsecured, the load fell onto plaintiff crushing his legs and pinning him underneath (*id.* at ¶¶ 17-18). Video surveillance shows multiple co-workers lifting the load off of plaintiff as he was dragged out from underneath (Exh K, NYSCEF Doc No 82).

DISCUSSION

“It is well settled that ‘the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact’” (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-54 [1st Dept 2010]). “The court’s function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility” (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-11 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined “in the light most favorable to the non-moving party” (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba*

Extruders, Inc. v Ceppos, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

Plaintiff contends that he is entitled to judgment as a matter of law pursuant to Labor Law § 240 [1], established by his own testimony and defendants' pleadings and document production, that defendants failed to secure the load of gates from falling and striking plaintiff, which presented the sort of extraordinary and foreseeable elevation-related risk for which the statute was enacted. Defendants respond that plaintiff is not entitled to summary judgment because the documents plaintiff's counsel submits in support of the motion are inadmissible as unauthenticated, plaintiff's motion is premature, and this incident is not the elevation-related risk contemplated by Labor Law 240 [1].

Document Authentication

Defendants' argument that the documents produced by plaintiff to support his motion are unauthenticated and therefore, should be disregarded, is devoid of merit. CPLR § 4540-a states that "[m]aterial produced by a party in response to a [discovery] demand . . . shall be presumed authentic when offered by an adverse party. Such presumption may be rebutted by a preponderance of evidence proving such material is not authentic." Therefore, the documents and video surveillance footage produced by defendants are presumed authenticated and defendants do not offer any evidence to rebut this presumption.

Outstanding Depositions

Defendants next argue that plaintiff's motion is premature because only plaintiff's deposition has been conducted and defendants have not had the opportunity to depose representatives from each of the defendant parties (*see Rodriguez v DeStefano*, 72 AD3d 926 [2d Dept 2010]). Defendants provide no explanation why deposing additional witnesses might lead

to facts that would support their opposition to the motion, especially in light of the crystal clear video surveillance footage and multiple accident reports that they themselves compiled (*Laporta v PPC Commercial, LLC*, 204 AD3d 538, 539 [1st Dept 2022] [“The fact that no depositions have been taken does not preclude summary judgment in plaintiff’s favor, as [defendant] failed to show that discovery might lead to facts that would support its opposition to the motion.”]). Additionally, plaintiff is permitted to move for summary judgment following his deposition, and such timing is not necessarily deemed premature (*see Ross v 1510 Assocs. LLC*, 106 AD3d 471 [1st Dept 2013]).

Labor Law § 240 [1]

Labor Law § 240 [1], also known as the Scaffold Law, provides, in relevant part:

All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

“The statute imposes absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker” (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011] [internal quotation marks and citation omitted]). To prevail on a Labor Law § 240 [1] cause of action, the plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 287-89 [2003]). “[T]he single decisive question is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603

[2009]). The legislative intent behind the statute is to place “ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident” (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotations and citations omitted]). Therefore, Labor Law § 240 [1] should be liberally construed to achieve the purpose for which it was framed (*Rocovich v Consol. Edison Co.*, 78 NY2d 509, 513 [1991]).

Here, plaintiff has produced sufficient evidence to meet his prima facie burden by showing that he was engaged in a statutorily covered activity unloading gates to install at the premises as part of a larger construction project when an unsecured load of gates fell on him, injuring him as a result. Plaintiff’s sworn testimony details how the unsecured load of gates fell on him (Plaintiff’s EBT, pp 27, 41-47, NYSCEF Doc No 89), photographs of the forklift and truck show no safety device preventing the gates from falling as they were loaded onto the forklift (Exh Q, NYSCEF Doc No 88), and the video surveillance unrefutably displays multiple, large gates falling from a height differential of a few feet onto plaintiff and pinning him underneath (NYSCEF Doc No 82). As seen in the video surveillance footage, the fact that it took multiple co-workers to lift the weight of the gates off of plaintiff illustrates that “the elevation differential here involved cannot be viewed as de minimis, particularly given the weight of the object[s] and the amount of force [they were] capable of generating, even over the course of a relatively short descent” (*Runner*, 13 NY3d at 605). Defendants’ accident reports corroborate plaintiff’s testimony and further detail plaintiff’s injuries as a result of the incident (Platform Solutions Accident Report, NYSCEF Doc No 83; 767 Fifth Partners Accident Report, NYSCEF Doc No 84; Structure Tone Accident Report, NYSCEF Doc No 85).

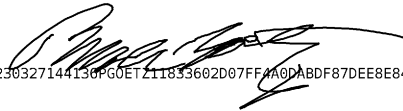
Defendants raise a couple of unpersuasive arguments that do not rebut plaintiff's showing of entitlement to judgment as a matter of law. First, defendants argue that plaintiff's accident does not fall under Labor Law 240 § [1] because plaintiff was not struck by a falling object that was improperly hoisted or inadequately secured since the gate pieces were resting on the forklift rather than a malfunctioning hoisting device. However, plaintiff is entitled to summary judgment when an object falls from a height and strikes him regardless of whether or not the object was in the process of being hoisted or secured (*Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758-59 [2008] [internal citation omitted] ["As our holding in *Outar v City of New York* indicates, 'falling object' liability under Labor Law § 240 [1] is not limited to cases in which the falling object is in the process of being hoisted or secured."]). The true standard of Labor Law § 240 [1] is whether the fall would have been prevented by a proper safety device (*see generally Outar v City of New York*, 5 NY3d 731 [2005], *affg* 286 AD2d 671 [2d Dept 2001]; *Ragubir v Gibraltar Mgt. Co., Inc.*, 146 AD3d 563 [1st Dept 2017]; *Jimenez v Metropolitan Transp. Auth.*, 124 AD3d 507 [1st Dept 2015]; *Hill v Acies Group, LLC*, 122 AD3d 428 [1st Dept 2014]). And plaintiff is under no obligation to identify the specific safety device that should have been used (*see Noble v AMCC Corp.*, 277 AD2d 20, 21 [1st Dept 2000]; *see also Jordan v City of New York*, 126 AD3d 619 [1st Dept 2015]).

Defendants also argue that the gates did not need to be secured. Similar to *Rutkowski v New York Convention Ctr. Dev. Corp.*, 146 AD3d 686, 686 [1st Dept 2017], where the First Department "reject[ed] defendant's contention that the lighting bar did not require securing with a safety device of the type contemplated by Labor Law § 240 because it was being carried by hand," so too here did the gates "require[] securing to prevent [them] from becoming dislodged or falling during the[ir]" transfer from the truck to the forklift.

Lastly, defendants' argument that an employee who disobeys the immediate instruction to work in a particular manner cannot recover is unsubstantiated by evidence suggesting plaintiff did not comply with any safety instructions (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35 [2004]).

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 240 [1] claim is granted.


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3/27/2023
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:			<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	SETTLE ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE